

142 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

E.ON Climate & Renewables North America, LLC Docket Nos. EL11-30-001

v.

Midwest Independent Transmission System Operator, ER12-451-000
Inc.

ORDER DENYING REHEARING, GRANTING IN PART CLARIFICATION, AND
ACCEPTING COMPLIANCE FILING

(Issued January 17, 2013)

1. On October 20, 2011, in response to a complaint filed by the Midwest Generation Development Group (Development Group),¹ the Commission directed Midwest Independent Transmission System Operator, Inc. (MISO) to remove from its Tariff² effective March 22, 2011, one of two options available for transmission owners to collect from interconnection customers the costs associated with network upgrades.³ The MISO

¹ The Development Group is a coalition comprised of E.ON Climate & Renewables North America, LLC, Clipper Windpower Development Co., Inc., Horizon Wind Energy LLC, Iberdrola Renewables, Inc., Invenergy Wind Development LLC, and Invenergy Thermal Development LLC.

² MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).

³ *E.ON Climate & Renewables North America, LLC v. Midwest Independent Transmission System Operator, Inc.*, 137 FERC ¶ 61,076 (2011) (Initial Order).

Transmission Owners⁴ filed a request for rehearing and clarification⁵ and the Organization of MISO States⁶ filed a request for rehearing.

2. In this order, the Commission denies rehearing and grants in part clarification, as discussed below. The Commission also accepts MISO's compliance filing, which removes Option 1 from the Tariff.

I. Background

3. In 2006, the Commission conditionally accepted tariff revisions incorporating the application of MISO's Transmission Expansion Planning Protocols (MTEP). MISO's proposal included a new attachment to its Tariff, Attachment FF, which set out MISO's process for developing its Transmission Expansion Plan including the allocation of costs associated with MTEP projects. Under Attachment FF, the costs for Network Upgrades required for a generator interconnection would be shared between the interconnection customer and transmission delivery service customers. Attachment FF provided that an interconnection customer was required to initially fund 100 percent of the cost of network upgrades required for its interconnection. The interconnection customer then would be eligible to receive Order No. 2003 transmission delivery credits for 50 percent of these

⁴ The MISO Transmission Owners for this filing consist of Ameren Services Company, as agent for Union Electric company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; Big Rivers Electric Corporation; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Duke Energy Corporation for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

⁵ MISO Transmission Owners Request for Clarification and Rehearing (MISO Transmission Owners Rehearing Request) filed November 21, 2011.

⁶ Request for Rehearing of the Organization of MISO States (Organization of MISO States Rehearing Request) filed November 21, 2011.

costs, if certain conditions were met, and the remaining 50 percent of costs would be participant funded, i.e., funded by the interconnection customer.⁷ In 2009, the Commission conditionally accepted further revisions to this allocation of costs such that an interconnection customer was required to participant fund 100 percent of the costs of network upgrades rated below 345 kV and 90 percent of the cost of network upgrades rated at 345kV and higher once commercial operation is achieved.⁸

4. Section III.A.d of Attachment FF provided the Transmission Owner with a choice between two options for recovering the costs of network upgrades subject to participant funding. Under Option 1, the Transmission Owner repaid 100 percent of such network upgrade costs to the interconnection customer and then required the interconnection customer to pay the Transmission Owner a monthly charge to recover the costs of the upgrades subject to participant funding over a negotiated period of time. Specifically, the interconnection customer paid a monthly Network Upgrade Charge, which included: (1) return on rate base, including general and common plant, (2) operations and maintenance (O&M) expense, (3) depreciation expense, (4) taxes other than income taxes, and (5) income taxes calculated under Attachment GG of the tariff. Charges collected under Attachment GG were subtracted from the Transmission Owner's transmission revenue requirement under Attachment O of the Tariff. Under Option 2, the Transmission Owner retained the interconnection customer's initial payments for the costs of network upgrades subject to participant funding as a contribution in aid of construction and assessed no further charges to the interconnection customer. Section III.A.d left the choice between the two options to the Transmission Owner, but it stated that the Transmission Owner's election must be made on a non-discriminatory and consistent basis.

5. On March 22, 2011 the Development Group filed a complaint against MISO, alleging that Option 1 was unjust and unreasonable. It argued that the election of Option 1 significantly increased the cost of interconnection. The Development Group further argued that Option 1 was inconsistent with Order No. 2003, contrary to cost causation principles, and that the Transmission Owner was not providing any service that warranted

⁷ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 28 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

⁸ *See* Initial Order, 137 FERC ¶ 61,076 at P 5. *See also* *Midwest Independent Transmission System Operator, Inc.*, 129 FERC ¶ 61,060, at P 8 (2009).

recovery under Option 1. Additionally, the Development Group maintained that Option 1 was unduly discriminatory because it imposed different costs on different groups of interconnection customers based on the Transmission Owner's election of Option 1 or Option 2.⁹

6. In the Initial Order, the Commission found that Option 1 was unjust, unreasonable, unduly discriminatory and contrary to Order No. 2003.¹⁰ The Commission explained that it was unjust and unreasonable for the "interconnection customer to bear the burden of funding the network upgrades up-front but then be repaid these costs and be subjected to a monthly Network Upgrade Charge reflecting the transmission owner's capital costs and income tax allowance, which unreasonably increases the interconnection customer's costs over time – solely at the discretion of the transmission owner."¹¹ The Commission also found that leaving the election of Option 1 to the sole discretion of a Transmission Owner "creates unacceptable opportunities for undue discrimination by affording a transmission owner the discretion to increase the costs of interconnection service by assigning both increased capital costs, as well as non-capital costs . . . to particular interconnecting generators, but not others."¹² Accordingly, the Commission granted the relief requested in the complaint and directed MISO to submit a compliance filing revising its Tariff to remove Option 1, effective March 22, 2011.¹³ On November 21, 2011, MISO made the compliance filing.¹⁴

II. Requests for Rehearing and Clarification

7. In their request for rehearing, the MISO Transmission Owners maintain that the Initial Order is contrary to the court's decision in *National Fuel Gas Supply Corporation*.¹⁵ In that case, according to the MISO Transmission Owners, the United

⁹ Initial Order, 137 FERC ¶ 61,076 at PP 7-12 (citing to complaint).

¹⁰ *Id.* P 40.

¹¹ *Id.* P 37.

¹² *Id.* P 38.

¹³ *Id.* PP 42-43.

¹⁴ Midwest Independent Transmission System Operator, Inc., Compliance Filing to Revise Tariff, Docket No. ER12-451-000 (filed Nov. 21, 2011).

¹⁵ MISO Transmission Owners Rehearing Request at 17 (citing *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 832, 844 (D.C. Cir. 2006) (*National Fuel*)).

States Court of Appeals for the District of Columbia Circuit struck down an attempt by the Commission to impose rules absent record evidence justifying imposition of the rules. They explain that the court held that, if the Commission chooses to rely on a theoretical threat when there is no evidence of harm, the Commission will need to show how the potential danger justifies imposition of costly prophylactic measures and explain why other mechanisms, such as the Commission's complaint procedures, are not adequate.¹⁶

8. The MISO Transmission Owners claim that the Initial Order similarly fails to justify the necessity of imposing costly measures, such as requiring transmission customers to pay the costs associated with network upgrades, when less burdensome solutions to address potential undue discrimination concerns are available. They state that potential alternatives include dispute resolution procedures or allowing customers to challenge the particular application of Option 1 by filing a complaint or an unexecuted generator interconnection agreement (GIA).¹⁷

9. Further, the MISO Transmission Owners assert that no evidence demonstrates that Transmission Owners have selected Option 1 in an unduly discriminatory manner.¹⁸ They also assert that the Tariff language requiring that the selection of Option 1 be made on a non-discriminatory and consistent basis is sufficient to protect against undue discrimination. In addition, the MISO Transmission Owners maintain that Option 1 is consistent with the Commission's policy in Order Nos. 2003 and 2003-A.¹⁹

10. Next, the MISO Transmission Owners claim that the Commission's determination that Option 1 is unjust and unreasonable is inconsistent with cost causation principles.²⁰ They claim that the Commission erred by finding it unfair to require an interconnection customer to pay the O&M, taxes, and other components of the Option 1 charge after it

¹⁶ *Id.*

¹⁷ *Id.* at 19.

¹⁸ *Id.* at 18.

¹⁹ *Id.* In Order Nos. 2003 and 2003-A, the Commission stated that it would afford independent transmission providers, such as RTOs, flexibility when choosing an interconnection pricing policy because such providers have no incentive to treat interconnection customers differently. *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 696 (2003) *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160.

²⁰ MISO Transmission Owners Rehearing Request at 19-20.

has provided an upfront payment for which it is reimbursed. They assert that no party has demonstrated that network upgrades are anything other than facilities that would not have been constructed but for the need to interconnect an interconnection customer, and that the Commission has previously found it just and reasonable to require an interconnection customer to pay its share of such costs.²¹ Further, the MISO Transmission Owners argue that the Commission's findings are inconsistent with recent decisions holding that costs should be allocated to parties in a manner that is at least "roughly commensurate" with benefits received.²² The MISO Transmission Owners further claim that the Commission failed to respond to assertions that the elimination of Option 1 would adversely affect customers in other zones, especially those zones with more generation than load. They add that the Option 1 costs will only be a small portion of the costs of building or interconnecting generation facilities.²³

11. The MISO Transmission Owners disagree with the Commission's finding that the Development Group's complaint is not a collateral attack on the order accepting Option 1.²⁴ On this point, they assert that the Commission has determined that parties cannot sit on their rights and challenge the outcome of an order at a later date simply because they do not like the outcome.²⁵ They state that the Commission provides no basis for

²¹ *Id.* at 20 (citing *Midwest ISO Transmission Owners*, 133 FERC ¶ 61,196, at PP 41-42 (2010)).

²² *Id.* at 20-21 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)).

²³ *Id.* at 22.

²⁴ *Id.* at 22-23.

²⁵ *Id.* (citing *California Trout v. Fed. Energy Reg. Comm'n*, 572 F.3d 1003 (9th Cir. 2009) (*California Trout*); *Merrill Lynch Commodities, Inc.*, 108 FERC ¶ 61,233 (2004) (*Merrill Lynch*); *CAlifornians for Renewable Energy, Inc.*, 107 FERC ¶ 61,238 (2004) (*CAlifornians for Renewable Energy*); *Niagara Mohawk Power Corp.*, 96 FERC ¶ 61,011 (2001) (*Niagara Mohawk*)).

deviating from this precedent and that the Commission's holding will increase regulatory uncertainty for filing parties.²⁶

12. If the Commission does not grant rehearing of the order, the MISO Transmission Owners ask the Commission to clarify that nothing in the Initial Order affects or abrogates any Facilities Service Agreements (FSAs) or other agreements in which a Transmission Owner has elected Option 1.²⁷ They state that such a clarification would be consistent with section 206 of the Federal Power Act (FPA),²⁸ which requires that any relief granted pursuant to a complaint must be prospective. The MISO Transmission Owners therefore contend that the Initial Order does not affect these FSAs because they were filed with the Commission prior to March 22, 2011, consistent with the approved Option 1 Tariff provisions then in effect, and allowed to become effective before that date.²⁹ Moreover, according to the MISO Transmission Owners, none of these FSAs was a subject of the complaint and the only relief requested in the complaint was that the Commission order MISO to remove Option 1 from the Tariff effective March 22, 2011.³⁰

13. The MISO Transmission Owners also ask the Commission to clarify that amending a GIA, a Facilities Construction Agreement, or "other agreement in which Option 1 was selected that became effective prior to March 22, 2011" will not affect the selection of Option 1.³¹ According to the MISO Transmission Owners, this clarification is justified because no such agreement was the subject of the Development Group's

²⁶ *Id.* at 23.

²⁷ In particular, the MISO Transmission Owners point to the following FSAs: (1) an FSA between Ameren Services Company, on behalf of Central Illinois Public Service Company and Ameren Energy Generating Company, accepted by the Commission in Docket No. ER10-369; (2) an FSA between Ameren Services, on behalf of Central Illinois Light Company and Rail Splitter Wind Farm, LLC, accepted by the Commission in Docket No. ER10-677; and (3) an FSA between Otter Tail Power Company and Rugby Wind LLC, accepted by the Commission in Docket No. ER11-2821. *Id.* at 11-12.

²⁸ 16 U.S.C. § 824e (2006).

²⁹ MISO Transmission Owners Rehearing Request at 12-13.

³⁰ *Id.* at 13.

³¹ *Id.*

complaint and the only relief sought in the complaint proceeding was the removal of Option 1, effective March 22, 2011.³²

14. The MISO Transmission Owners further ask the Commission to clarify that nothing in the Initial Order affects a Transmission Owner's right to select Option 1 when the right to select Option 1 was deferred at the time the underlying GIA was executed.³³ They explain that on July 15, 2010, MISO and certain of the MISO Transmission Owners submitted a joint filing to revise MISO's cost allocation methodology that would also require the Transmission Owner to declare its election of Option 1 or 2 within fifteen days of MISO's tender of the relevant draft GIA, Facilities Construction Agreement, or Multi-Party Facilities Construction Agreement.³⁴ Prior to that time, the Transmission Owner could select Option 1 as late as the commercial operation date of the relevant interconnection customer's generating facility. The MISO Transmission Owners state that such agreements were entered into prior to July 16, 2010³⁵ and prior to the complaint's March 22, 2011 refund effective date, when the decision to elect Option 1 at a later date was expressly allowed under the Tariff as just and reasonable. They again note that none of these agreements were the subject of the complaint or the relief sought in the complaint.³⁶

15. To the extent that the Commission does not grant these clarifications, the MISO Transmission Owners ask the Commission to grant rehearing of the Initial Order because relief under section 206 can be prospective only and any retroactive application of the complaint would be contrary to this requirement.³⁷

³² *Id.* at 14.

³³ *Id.*

³⁴ *Id.* at 14 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER10-1791, filed July 15, 2010).

³⁵ *Id.* at 14-15 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221, at P 335 (2010), *order on reh'g*, 137 FERC ¶ 61,074 (2011)). The Tariff revisions proposed in Docket No. ER10-1791 became effective July 16, 2010. *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 at P 503.

³⁶ *Id.*

³⁷ *Id.* at 15.

16. The Organization of MISO States maintains that the Commission incorrectly concluded that it is unfair to require an interconnection customer to provide an upfront payment for which it is reimbursed and then require that customer to pay the O&M, taxes, and other components of the Option 1 charge.³⁸ The Organization of MISO States argues that it is undisputed that network upgrades are facilities that would not have been constructed but for the need to interconnect an interconnection customer. The Organization of MISO States argues that in other contexts, the Commission has previously found that requiring an interconnection customer to pay such costs is just and reasonable.³⁹ Additionally, the Organization of MISO States maintains that the Commission's findings are inconsistent with cost causation principles. The Organization of MISO States contends that the Commission's failure to adequately respond to these cost causation arguments renders the Initial Order arbitrary and capricious.

III. Further Pleadings

17. On December 5, 2011, enXco Development Corporation (enXco) filed a motion to intervene out-of-time, motion for leave to answer the MISO Transmission Owners' request for rehearing and clarification, and a request for rehearing and clarification. EnXco states that its filing out of time was caused by the recent injection of a request for a new Commission determination. Subsequently, the Development Group filed an answer to the MISO Transmission Owners' and the Organization of MISO States' requests for rehearing and clarification, and Montana-Dakota Utilities Co. (Montana-Dakota) filed an answer to enXco's request for clarification.

IV. Discussion

A. Procedural Matters

18. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. enXco has not met this higher burden of justifying its late intervention.⁴⁰ In light of our decision to deny enXco's late motion to

³⁸ Organization of MISO States Rehearing Request at 3-4.

³⁹ *Id.* (citing *Midwest ISO Transmission Owners*, 133 FERC ¶ 61,196, at PP 41-42 (2010)).

⁴⁰ *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

intervene, we will dismiss enXco's request for rehearing and clarification; because enXco is not a party to this proceeding, it lacks standing to seek rehearing of the Initial Order under the FPA and the Commission's regulations.⁴¹

19. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2012), prohibits an answer to a request for rehearing. Accordingly, we will reject the Development Group's and enXco's answers. In light of our decision to dismiss the request for rehearing filed by enXco, we will dismiss Montana-Dakota's answer thereto.

B. Substantive Matters

1. Opportunities for Undue Discrimination Under Option 1

20. The MISO Transmission Owners argue that the Commission's findings in the Initial Order directing MISO to eliminate Option 1 because it "creates opportunities for undue discrimination"⁴² are contrary to judicial precedent and must be reversed.⁴³ In support, MISO Transmission Owners cite to *National Fuel*⁴⁴ for the proposition that "[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking."⁴⁵ MISO Transmission Owners' reliance on *National Fuel* is misplaced, however.

21. *National Fuel* is inapplicable to this case because Commission action here is supported by substantial record evidence. As stated elsewhere, to Option 1 would require the interconnection customer to bear the burden of funding the network upgrades up-front and then also be subject to a monthly Network Upgrade Charge reflecting the Transmission Owner's capital costs and income tax allowance, which increases the interconnection customer's costs over time with no difference in the interconnection

⁴¹ See 16 U.S.C. § 825l(a) (2006); 18 C.F.R. § 385.713(b) (2012). See also *Southern Company Servs., Inc.*, 92 FERC ¶ 61,167 (2000).

⁴² Initial Order, 137 FERC ¶ 61,076 at PP 39-40.

⁴³ MISO Transmission Owners Rehearing Request at 17.

⁴⁴ *National Fuel*, 468 F.3d at 831.

⁴⁵ MISO Transmission Owners Rehearing Request at 17 (citing to *National Fuel*, 468 F.3d at 843).

service provided.⁴⁶ The *National Fuel* remand is further distinguishable as it was a result of challenges to a new rule issued by the Commission concerning an expansion to the Standards of Conduct regulating natural gas pipelines' interactions with affiliated entities.⁴⁷ The rulemaking had been prompted by the threat of pipelines granting undue preferences to non-marketing affiliates (the Standards of Conduct already prohibited granting such preferences to marketing affiliates).⁴⁸ This case does not concern the formation of generally applicable rules, like *National Fuel*, but rather concerns specific provisions of one tariff – MISO's – that govern reimbursement for the cost of network upgrades that result from generator interconnection. Nothing in *National Fuel* prohibits us from taking seriously a threat posed by the market rules of a single utility tariff. The Initial Order described, and remedied, just such an opportunity for undue discrimination. We therefore disagree with the MISO Transmission Owners' argument that *National Fuel* may properly be used to suggest that the Initial Order does not constitute reasoned decisionmaking.

22. The MISO Transmission Owners next contend that the Commission's finding concerning undue discrimination, which led to its decision to strike Option 1 from the Tariff, was in error. They contend that "there is no evidence that Option 1 ha[s] been selected in an unduly discriminatory manner," and that Tariff language stating that this choice must be made in a non-discriminatory way is sufficient to protect customers from the risk of harm.⁴⁹ The MISO Transmission Owners also state that a transmission owner's election of Option 1 or 2 is subject to MISO's oversight and that an interconnection customer will have "ample time" to contest any election.⁵⁰ They further state that an interconnection customer can direct that the GIA be filed on an unexecuted basis if it disagrees with the election.

23. We disagree with the MISO Transmission Owners' argument, and we will deny rehearing on this point. At the outset, we note that the Tariff does not include specific criteria to guide, limit, or otherwise check a transmission owner's discretion over this choice other than language stating that the election must be made on a non-discriminatory and consistent basis. This language may remind the transmission owners of their legal

⁴⁶ Initial Order, 137 FERC ¶ 61,076 at P 37.

⁴⁷ *National Fuel*, 468 F.3d at 833.

⁴⁸ *Id.* at 837-38.

⁴⁹ MISO Transmission Owners Rehearing Request at 18.

⁵⁰ *Id.* at 19.

obligations,⁵¹ but we find that it does not provide sufficient protection in this instance. We again conclude that, while there has been no claim that to date the selection between Option 1 and Option 2 has been made in an unduly discriminatory manner, the choice between the two options nevertheless does create an opportunity for undue discrimination.

24. As noted in the Initial Order, Order No. 2003 affords independent transmission providers some flexibility with regard to interconnection pricing, but in situations where “the Transmission Provider is not independent” it may have “an incentive to find that a disproportionate share of the costs of expansions needed to serve its own customers is attributable to competing Interconnection Customers,” and the Commission would find any policy that creates opportunities for such discriminatory behavior to be unacceptable.⁵² Accordingly, as the Commission said in the Initial Order, permitting the (non-independent) transmission owner to select between Option 1 and Option 2 is inconsistent with Order Nos. 2003 and 2003-A because it creates opportunities for unduly discriminatory behavior.⁵³

25. The complaint maintained that this is not unlike *Dynegy Midwest*,⁵⁴ where the D.C. Circuit vacated Commission orders that subjected generators to two different rate schedules; generators would have been compensated for reactive power based on the choice of each zone’s transmission owners, even though MISO generators compete with each other across zonal borders.⁵⁵ In the instant proceeding, as in *Dynegy Midwest*, the transmission owners (including many non-independent transmission owners) make the election between two different methods of allocating the costs of interconnection-related Network Upgrades to generators competing with each other across zonal borders. As discussed above, we find that this situation presents an unacceptable risk of undue discrimination.

⁵¹ Indeed, this language merely restates what the statute already requires, i.e., that, under section 205 of the FPA, no public utility shall subject any person to any undue prejudice or disadvantage in connection with the sale or transmission of electricity. 16 U.S.C. § 824d(b) (2006).

⁵² Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 696.

⁵³ Initial Order, 137 FERC ¶ 61,076 at PP 38-39.

⁵⁴ Complaint at 28-30 (citing *Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122 (D.C. Cir. 2011) (*Dynegy Midwest*)).

⁵⁵ *Id.* (citing *Dynegy Midwest*, 633 F.3d at 1125).

2. Justness and Reasonableness of Option 1

26. The MISO Transmission Owners argue that the Commission's findings are inconsistent with recent decisions holding that costs should be allocated to parties in a manner that is at least "roughly commensurate" with benefits received.⁵⁶ The MISO Transmission Owners contend that if the Commission has found that it is unfair to require an interconnection customer to pay O&M, taxes, and other portions of the Option 1 charge, then its decision is unfair. The MISO Transmission Owners state that no party has demonstrated that Network Upgrades are anything other than facilities that would not have been constructed but for the need to interconnect an Interconnection Customer, and that requiring an interconnection customer to pay its share of such costs is just and reasonable.⁵⁷ The Organization of MISO States also seeks rehearing stating that Option 1 is consistent with cost causation principles.⁵⁸ We will deny rehearing on this point.

27. As noted above, the Commission has found that Option 1 is unjust and unreasonable because it first requires an interconnection customer to fund the construction of network upgrades up-front, and then permits the transmission owner to elect to repay this amount and charge the interconnection customer for the transmission owner's capital costs and income tax allowance over time as if the transmission owner had funded the construction. Under the *pro forma* Large Generator Interconnection Agreement (LGIA) adopted in Order No. 2003 and MISO's Tariff, the interconnection customer is required to provide the funding for network upgrades up-front, unless the Transmission Owner elects to fund the upgrades itself.⁵⁹ Thus, a Transmission Owner

⁵⁶ MISO Transmission Owners Rehearing Request at 20 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)).

⁵⁷ *Id.* at 20 (citing *Midwest ISO Transmission Owners and Midwest Independent Transmission System Operator, Inc.*, 133 FERC ¶ 61,196, at PP 41-42 (2010)) (approving revisions to Attachment GG of the MISO Tariff that allocate a portion of depreciation expense to interconnection customers) (Attachment GG Order).

⁵⁸ Organization of MISO States Rehearing Request at 4.

⁵⁹ MISO Tariff, Attachment X, *pro forma* LGIA, section 11.3.

may finance the construction of the network upgrades itself.⁶⁰ But here, if the Transmission Owner selects Option 1, the interconnection customer must obtain the financing necessary to fund the construction of network upgrades, and then also must directly bear the Transmission Owner's capital costs and income tax allowance over a prescribed time period (e.g., 30 years). We find that it is unjust and unreasonable to require the interconnection customer to bear the burden of funding the network upgrades up-front and then also be subject to a monthly Network Upgrade Charge reflecting the Transmission Owner's capital costs and income tax allowance solely at the discretion of the Transmission Owner, which increases the interconnection customer's costs over time with no difference in the interconnection service provided.⁶¹ No party presented evidence refuting the information supplied by the Development Group in this regard.

28. We observe that what is at issue in this case is not whether costs can be allocated to generators for network upgrades, i.e., the extent to which network upgrades required for generator interconnection can be participant-funded, but rather the mechanisms by which the interconnection customers reimburse the Transmission Owners for such costs and whether those mechanisms are just and reasonable and not-unduly discriminatory. We therefore deny rehearing to the extent the MISO Transmission Owners and the Organization of MISO States argue that the Initial Order is inconsistent with recent cost allocation cases.

29. Finally, we disagree with the contention that the Commission failed to address the MISO Transmission Owners' argument that the elimination of Option 1 would adversely affect customers in other zones, especially those zones with more generation than load. The Commission explained that "[t]o the extent that MISO believes that elimination of Option 1 raises concerns about the impact of certain costs on particular transmission owners and their customers, MISO may file a proposal under section 205 of the FPA to address such concerns."⁶²

⁶⁰ We note that we do not view the provisions of the *pro forma* LGIA adopted in Order No. 2003 and MISO's Tariff that allow a Transmission Owner to fund the network upgrades itself, in lieu of the interconnection customer providing such funding, as limiting the allocation methodology for recovery of the costs of such network upgrades that may be proposed under the independent entity variation standard. Our focus here is on the practical effect on the interconnection customer of requiring it to fund the costs of the network upgrades up-front and then refinance those costs and pay the Transmission Owner's capital costs and income tax allowance.

⁶¹ Initial Order, 137 FERC ¶ 61,076 at P 37.

⁶² *Id.* P 42.

3. Whether the Complaint was an Improper Challenge of the February 3 Order

30. The MISO Transmission Owners state that the Commission's decision that the complaint was not a collateral attack on the earlier February 3 Order is an unexplained departure from its prior policy and should be reversed. The MISO Transmission Owners assert that, in numerous cases, the Commission has determined that parties cannot sit on their rights and challenge the outcome of an order at a later date simply because they do not like the outcome.⁶³

31. The complaint was not a collateral attack on the February 3 Order, however. Option 1 and the choice between Option 1 and 2 were first included in MISO tariff filings in 2005. The Initial Order correctly explained that the February 3 Order accepting Attachment FF did not expressly address Option 1, which weighs heavily against characterizing Development Group's complaint as a collateral attack on the February 3 Order.⁶⁴

32. We further disagree with the MISO Transmission Owners' claim that the Development Group's complaint was a collateral attack on other prior Commission orders. While they cite Commission and judicial precedent to support their claim, the situation here differs from that in each of those decisions. *Californians for Renewable Energy* involved a complainant that failed to intervene and seek relief in an earlier complaint proceeding that dealt with the same issues.⁶⁵ Here, the issues are not the same as the issues presented before. In both *Niagara Mohawk* and *Merrill Lynch*, the Commission dismissed rehearing requests filed by parties that failed to raise their arguments in the original underlying proceedings.⁶⁶ Here we are not faced with

⁶³ MISO Transmission Owners Rehearing Request at 18 (citing *Californians for Renewable Energy*, 107 FERC ¶ 61,238 at P 6, n.5; *Merrill Lynch*, 108 FERC ¶ 61,233 at PP 3, 14; *Niagara Mohawk*, 96 FERC at 61,043-61,044).

⁶⁴ See *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); see also *Integritys Energy Servs., Inc. v. New Brunswick Power Gen. Corp.*, 127 FERC ¶ 61,322, at P 23 n.27 (2009).

⁶⁵ *Californians for Renewable Energy*, 107 FERC ¶ 61,238 at P 6, n.5.

⁶⁶ *Merrill Lynch*, 108 FERC ¶ 61,233 at PP 3, 14; *Niagara Mohawk*, 96 FERC at 61,043-61,044.

arguments made untimely on rehearing. In *California Trout*, the United States Court of Appeals for the Ninth Circuit found that the Commission reasonably determined that a party lacked good cause to intervene out of time consistent with Rule 214 of the Commission's Rules of Practice and Procedure.⁶⁷ Here we are not faced with an out-of-time intervention. None of these decisions speaks to the specific situation present here.

33. Here, the Development Group filed its complaint pursuant to FPA section 206, requesting that the Commission direct MISO to remove Option 1 from its Tariff. The issuance of an order in an FPA section 205 proceeding does not bar a future, appropriately supported challenge to the accepted tariff provisions pursuant to FPA section 206.⁶⁸

4. Request for Clarification

34. Finally, we grant in part the MISO Transmission Owners' request for clarification. We find that the Initial Order did not automatically modify any existing agreement; this issue was not before the Commission. However, the Commission will clarify that its decision will not apply to agreements effective prior to March 22, 2011.⁶⁹ We believe that this is a reasonable remedy that balances the interests of the parties, the need for regulatory certainty, and ease of administration.

V. Compliance Filing

35. In the Initial Order, the Commission granted the relief requested in the complaint and directed MISO to submit a compliance filing revising its Tariff to remove Option 1, effective March 22, 2011.⁷⁰ On November 21, 2011, MISO made the compliance filing.⁷¹

⁶⁷ *California Trout*, 572 F.3d 1003, 1025 (citing 18 C.F.R. § 385.214(b)(3) &(d)(1)(v)).

⁶⁸ *NSTAR Elec. Co. v. ISO New England Inc.*, 125 FERC ¶ 61,187, at P 25 (2007).

⁶⁹ *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (the breadth of Commission discretion is, if anything, at its zenith when fashioning remedies).

⁷⁰ Initial Order, 137 FERC ¶ 61,076 at P 1.

⁷¹ Midwest Independent Transmission System Operator, Inc., Compliance Filing to Revise Tariff, Docket No. ER12-451-000 (filed November 21, 2011).

36. Notice of the compliance filing was published in the *Federal Register*, 76 Fed. Reg. 75,539 (2011), with protests and interventions due on or before December 12, 2011. Motions to intervene were timely filed by Duke Energy Corporation, Exelon Corporation, Wisconsin Electric Power Company, American Municipal Power, Inc., Midwest ISO Transmission Owners, and Edison Mission Energy. On December 13, 2011, Iberdrola Renewables and Consumers Energy filed motions to intervene out-of-time.

37. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d)(2012), the Commission will grant Iberdrola Renewables' and Consumers Energy's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

38. MISO submitted proposed revisions to remove Option 1 from Attachment FF and related references in Attachment X to its Tariff. In compliance with the Initial Order, MISO requests that the Commission make the proposed revisions effective March 22, 2011.

39. We find that MISO's tariff revisions comply with the Commission's directives in our Initial Order in Docket No. EL11-30-000, and are accepted.

The Commission orders:

(A) The Commission hereby denies rehearing and grants in part clarification, as discussed in the body of this order.

(B) The Commission hereby accepts MISO's proposed Tariff revisions, effective March 22, 2011, as discussed in the body of this order.

By the Commission. Commissioner Clark is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.